90-1294

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
Petitioner,

vs.

HONORABLE NICHOLAS G. BYRON, JUDGE,
Circuit Court of Madison County, Illinois,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTIONS PRESENTED

In 1984, Petitioner Chicago and North Western Transportation Company ("CNW") was sued under the Federal Employers Liability Act, 45 U.S.C. §51 et seq., for personal injuries allegedly suffered by its employee Marlin Garien ("Garien") in 1981 at CNW's facility in Clinton, Iowa. Although he resided in Clinton County, Iowa, in 1984 Garien originally filed his action against CNW in the Circuit Court of Madison County, Illinois, approximately 270 miles south of Clinton, Iowa. That action was dismissed on the basis of *forum non conveniens*. Garien's action was then filed in Circuit Court of Clinton County, Iowa, where, after protracted delays, it was dismissed, on the circuit court's own motion, for failure to prosecute. The action was then refiled in the Circuit Court of Clinton County, Iowa where, on motion of petitioner CNW, the circuit court granted summary judgment in favor of CNW based on the statute of limitations. Garien did not appeal that dismissal, and the Iowa judgment became final.

Then, fifteen months after summary judgment was granted, Garien sought leave to "reinstate" his action, in the Circuit Court of Madison County, Illinois. Over CNW's objection, respondent Nicholas G. Byron, Judge of the Circuit Court of Madison County, allowed "reinstatement", despite the final Iowa judgment.

On October 29, 1990, petitioner CNW filed in the Supreme Court of Illinois its motion for leave to file a complaint for order of prohibition or, in the alternative, for a supervisory order, seeking review of Judge Byron's order allowing "reinstatement." On November 20, 1990, the Supreme Court of Illinois entered its per curium order denying CNW's petition, and requiring CNW to proceed to trial in Illinois despite the final Iowa judgment properly finding that Garien had failed to comply with the statute of limitations applicable to an FELA claim.

The questions presented in this action are as follows:

1. May a circuit judge of one state, consistent with the Full Faith and Credit Clause of Article 4, Section 1 of the United States Constitution,

allow an FELA claim to be initiated when defendant has obtained final judgment in its favor on the same claim in the courts of another state?

2. In dismissing an FELA action on the grounds of *forum non conveniens*, does a state court have unlimited discretion to extend the three-year statute of limitations under 45 U.S.C. § 56?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding seeking a writ of prohibition or supervisory order below are petitioner Chicago and North Western Transportation Company and respondent the Honorable Nicholas G. Byron, Judge, Circuit Court of Madison County. The plaintiff in the underlying personal injury action is Marlin Garien.

The parent company for Chicago and North Western Transportation Company is CNW Corporation. Midwestern Railroad Properties, Inc.; North Western Leasing Company; and Wisconsin Town Lot Company are subsidiaries of petitioner. Western Railroad Properties, Inc.; Iowa Transfer Railway Company; Peoria and Pekin Union Railway Company; Kansas City Terminal Railway Company; Trailer Train Company; MT Properties, Inc.; and Transportation Data XChange, Inc. are affiliated companies of petitioner.

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HONORABLE NICHOLAS G. BYRON, JUDGE,
Circuit Court of Madison County, Illinois,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner Chicago and North Western Transportation Company ("CNW") respectfully petitions for a writ of certiorari to review the order of the Supreme Court of Illinois denying CNW's Motion For Leave To File Complaint For Order Of Prohibition, Or In The Alternative, For A Supervisory Order. In that application for a writ of prohibition, CNW had sought the reversal of the order of respondent The Honorable Nicholas G. Byron, Judge of the Circuit Court of Madison County, Illinois, "reinstating" Marlin Garien's ("Garien") FELA claim against CNW, despite a final order of the Circuit Court of Clinton County, Iowa, granting CNW summary judgment against the identical claim.

ORDERS BELOW

The order of the Circuit Court of Madison County (Byron, J.) granting Garien leave to "reinstate" is unreported and is attached as

Appendix A, infra, A-1. The order of the Supreme Court of Illinois denying CNW's Petition For Leave To File A Complaint For Order Of Prohibition Or, In The Alternative, For Supervisory Order, is unreported and is attached hereto as Appendix B, infra, A-3.

JURISDICTION

The order of the Supreme Court of Illinois, en banc (App. B, infra, A-3) was entered on November 20, 1990. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article 4, Section 1, United States Constitution

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. §1738:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

45 U.S.C. § 56:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

STATEMENT OF THE CASE

1. INTRODUCTION

Respondent Judge Byron of the Circuit Court of Madison County has allowed Marlin Garien to "reinstate" his claim against CNW, despite the undisputed fact that the Circuit Court of Clinton County, Iowa, had previously granted CNW's motion for summary judgment on the same claim. Garien did not appeal the Iowa court order granting summary judgment. Rather, Garien simply waited fifteen months and then sought "reinstatement" of the action in the Circuit Court of Madison County, Illinois. The Supreme Court of Illinois rejected CNW's request for a writ of prohibition to overturn Judge Byron's order allowing "reinstatement" and continued prosecution of the claim against CNW. In so doing, Judge Byron and the Supreme Court of Illinois have blatantly ignored the protections afforded CNW by Article 4, Section 1 of the United States Constitution, and fundamental principles of res judicata.

The questions presented to this Court are (1) whether a circuit court of one state may, at its discretion, simply refuse to give full faith and credit to the final judgment of another state, and force a party to defend a claim already finally decided in its favor; and (2) whether a state court has unlimited discretion to extend a federal statute of limitations.

The policy and objectives of Article 4, Section 1 are served effectively only if its application is diligently monitored and enforced. State courts cannot be allowed to ignore the final, binding judgments of other states, or the binding provisions of the Federal Employers Liability Act which limit the time within which a person may sue his employer for injuries incurred on the job. 45 U.S.C. § 56. Illinois courts may not refuse to honor the final judgment of sister states or the mandates of federal law in order to shelter a party who has failed to pursue diligently his own claim.

Because there exists an undisputed final judgment against Garien on the claim which was "reinstated," Judge Byron did not have discretion to allow "reinstatement" and continued prosecution of that claim. When Garien filed his motion to "reinstate," the only action

consistent with Article 4, Section 1, and 45 U.S.C. § 56 was to deny Garien's motion. When Judge Byron failed to give the requisite full faith and credit to the Iowa judgment, and failed to enforce the federal statute of limitations, he denied CNW its federally guaranteed rights. In failing to issue the writ of prohibition, the Supreme Court of Illinois perpetuated the constitutional error perpetrated by Judge Byron.

2. PROCEDURAL HISTORY OF GARIEN'S CLAIM AGAINST PETITIONER CNW.

The following summarizes the history of Garien's FELA claim against CNW.

(1) September 13, 1981: Garien, a resident of Clinton, Iowa allegedly suffers an injury when, it is claimed, a piece of plywood falls on his hard hat while he is working for Chicago and North Western Transportation Company's ("CNW") at its Clinton, Iowa carshop.

(2) September 13, 1984: Based on the alleged injury in 1981, Garien files an FELA lawsuit against CNW in Madison County, Illinois, hundreds of miles away from Clinton County, Iowa.

(3) January 2, 1985: Pursuant to a motion filed by CNW, the Circuit Court of Madison County dismisses Garien's lawsuit on the basis of *forum non conveniens*. The order makes no reference to waiver by CNW of any of its statutory defenses, including the defense of statute of limitations.

(4) March 22, 1985: Garien files a lawsuit against CNW in Clinton County, Iowa, based on

the alleged injury in 1981 ("the first Iowa lawsuit").

(5) May 12, 1986: The Circuit Court of Clinton County, Iowa, pursuant to I.R.C.P. Rule 215.1, advises the parties that the first Iowa lawsuit will be stricken on January 1, 1987, unless Garien initiates certain actions to progress his lawsuit prior to September 15, 1986.

(6) August 14, 1986: The Circuit Court of Clinton County, Iowa again advises the parties that the first Iowa lawsuit will be for trial and subject to dismissal on January 1, 1987, unless Garien takes certain specific steps to progress his case toward trial.

(7) January 2, 1987: After the above warnings to Garien, and Garien's failure to take the required action, the Circuit Court of Clinton County, Iowa, on its own motion, dismisses the first Iowa lawsuit for failure to prosecute.

(8) September 14, 1987: Nine months later, Garien refiles his lawsuit against CNW in the Circuit Court of Clinton County, Iowa (the "second Iowa lawsuit"), now over two and one-half years after the dismissal of the Illinois lawsuit under the doctrine of *forum non conveniens* and over six years after the alleged injury.

(9) October 23, 1987: CNW files a motion to dismiss or for summary judgment in the second

Iowa lawsuit, based on the statute of limitations. In opposing the motion, Garien never claims that CNW has waived or should be deemed to have waived the defense of the statute of limitations (App. C, A-4).

(10) June 6, 1988: The Circuit Court of Clinton County, Iowa grants CNW's motion for summary judgment (App. D, A-11). Garien does not appeal the granting of that motion.

(11) September 14, 1989: Over fifteen months after the Iowa Court has granted summary judgment in the second Iowa lawsuit, Garien files his motion to reinstate the action in Madison County, Illinois (App. E, A-12).

(12) May 14, 1990: Over CNW's objection (App. F, A-14), respondent Judge Byron grants Garien's motion for reinstatement (App. A, A-1).

On October 29, 1990, CNW sought review of Judge Byron's order by filing with the Supreme Court of Illinois its Motion for Leave to File Complaint For Order of Prohibition Or, In The Alternative, For Supervisory Order, with Complaint and Suggestions In Support (App. G, infra, A-25 through A-47). On November 20, 1990, the Supreme Court of Illinois, en banc, issued its order denying CNW's Motion For Leave To File The Complaint For Order of Prohibition (App, B, infra, A-3).

In its Reply to Plaintiff's Memorandum In Support Of Plaintiff's Motion To Reinstate (App. F, infra, A-19), CNW relied on the final judgment entered by the Iowa court, and specifically urged that Judge

Byron should deny the motion to "reinstate" because the United States Constitution "requires that each state give full faith and credit to the judgments of the courts of a sister state," quoting *Fender v. St. Louis Southwestern Ry. Co.*, 392 N.E.2d 82 (Ill. App. 5th Dist. 1979), and citing *Sutton v. Leib*, 342 U.S. 402 (1952), reh'g denied 343 U.S. 921. In its Suggestions In Support Of Its Petition For Leave To File Complaint For Order Of Prohibition, CNW argued to the Illinois Supreme Court that "The full faith and credit clause of the United States Constitution embodies the common law doctrine of res judicata and requires Illinois courts to recognize and apply the final judgments of courts in other states." (App. G, infra, A-42).

Nevertheless Judge Byron has ruled that Garien may now pursue this litigation anew in Madison County, and the Supreme Court of Illinois has not seen fit to overrule or otherwise counter Judge Byron's unconstitutional action.

As demonstrated below, Judge Byron's order is contrary to CNW's rights under the United States Constitution, and the provisions of 45 U.S.C. § 56, and requires the issuance of a writ of certiorari from this Court.

REASONS FOR GRANTING THE PETITION

The "reinstatement" of Garien's action by respondent Judge Byron directly violates the full faith and credit requirements enumerated by Article 4, Section 1 of the United States Constitution, and the limitations imposed by 45 U.S.C. § 56.

1. The Order Of The Supreme Court of Illinois' Denying CNW's Motion For Leave To File A Complaint For Order Of Prohibition Was A Final Order Subject To Review By This Court By Writ of Certiorari.

Under Illinois law, an application for a writ of prohibition is an "independent proceeding", as is an application for a supervisory order. Illinois Supreme Court Rules 381, 383, S.H.A. ch. 110A, pars. 381, 383. Despite the continuation of Garien's action in the Circuit Court of Madison County, the Illinois Supreme Court's Order of November 20 finally concluded petitioner's original action seeking an order of prohibition or a supervisory order, giving full faith and credit to the final judgment of the Circuit Court of Clinton County, Iowa. The order of the Supreme Court of Illinois denying the motion for leave to file the complaint for such orders therefore was a final judgment reviewable by certiorari by the United States Supreme Court. *Cf. World Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 296-7, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980); *Madruga v. Superior Court*, 346 U.S. 556, 557 (1954). *See also Alva Fisher v. The District Court of the Sixteenth Judicial District of Montana, In And For The County of Rosebud*, 424 U.S. 382, 386-7, n.7 (1976).

2. The Ruling By The Circuit Court of Clinton County Granting Petitioner's Motion For Summary Judgment Was A Final Order Disposing of Garien's Claim On The Merits.

The action currently pending in the Circuit Court of Madison County is based on an injury allegedly suffered by Garien in Clinton County, Iowa, on September 13, 1981. After dismissal on the grounds of *forum non conveniens*, the identical claim was untimely filed in

Clinton County, Iowa, three months later.[1] After that action was dismissed on the court's own motion for failure to prosecute, the identical claim was refiled in Clinton County, Iowa, nine months later. Upon motion by CNW, the Circuit Court of Clinton County granted summary judgment in favor of CNW, based on the statute of limitations. Garien did not appeal the order of the Iowa circuit court granting summary judgment, but allowed that judgment to become final under Iowa law. Fifteen months later, Garien sought "reinstatement" of his action, now nine years old, in the Circuit Court of Madison County. In so doing, for the first time he claimed that CNW had "waived" the statute of limitations.

Under both Iowa and Illinois law, the Order of the Circuit Court of Clinton County granting summary judgment was a judgment, on the merits, as to Garien's FELA claim against CNW. *Cf. Banks v. City of Ames*, 369 N.W.2d 451, 457 (Ia. 1985); *Chang v. Northwestern memorial Hospital*, 549 F. Supp. 90, 95 (N.D. Ill. 1982); *Kraus v. Metropolitan Two Illinois Center*, 146 Ill. App.3d 210, 100 Ill. Dec. 15, 496 N.E.2d 1080 (1986). As a result of Garien's failure to appeal the summary judgment in the second Iowa action, that ruling became a final adjudication of Garien's claim on the merits, barring Garien, again under both Iowa and Illinois law, from relitigating that claim against CNW. *Credit Industrial Corporation v. E. C. Miller*, 125 N.W.2d 142, 144 (Ia. 1963); *Brown v. Schoenberg*, 121 Ill. App.2d 342, 257 N.E.2d 539 (1970). The Iowa judgment is res judicata as to Garien's claim.

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[1] Pursuant to this Court's ruling in *Burnett v. New York Central Ry. Co.*, 380 U.S. 424 (1965), plaintiff had thirty-one days to file his claim in the proper forum because he had originally filed his claim in the improper forum one day before the expiration of the three-year statute of limitations. *Accord, Stephan v. Selvic Marine Towing Company*, 147 Ill. Dec. 147, 149-50, 559 N.E.2d 147 (Ill. App. 1st Dist. 1990). See Section 5, infra.

3. The Full Faith And Credit Clause Requires That The Iowa Judgment Be Applied To Bar Further Litigation Of Garien's Claim Against CNW.

Under Article 4, Section 1 of the United States Constitution, respondent Judge Byron may not allow Garien to avoid the res judicata effect of the Iowa judgment simply by moving his claim to another state. In fact, it is exactly such conduct that the full faith and credit provisions are intended to prevent. *Sutton v. Leib*, 342 U.S. 402, 407 (1952). The Illinois courts should not be allowed to flout those provisions or disregard the protection of finality which they are intended to provide to litigants and society as a whole.

Article 4, Section 1 of the United States Constitution provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

The principles and objectives of the Full Faith and Credit Clause are clear and compelling.

> This clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are at rest.... That clause compels that controversies be stilled so that where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered.... By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of the national jurisprudence, and therefore federal questions cognizable here.

Riley v. New York Trust Company, 315 U.S. 343, 348-9 (1942).

The Full Faith and Credit Clause and 28 U.S.C. § 1738 require the judgments of the courts of one state to be given the same faith and

credit in another state as they have in the courts of the state rendering them. *Morris v. Jones*, 329 U.S. 545, 547 (1947).

A judgment of a court having jurisdiction over the parties and the subject matter is res judicata as to the claims asserted. *Morris v. Jones*, 329 U.S. at 550. Neither the Iowa court's jurisdiction over the subject matter and the parties nor the authenticity of the Iowa court's judgment are disputed. *Cf. Titus v.Wallick*, 306 U.S. 282, 287 (1939).

Where a court refuses to give effect to the judgment of a court of another state, it refuses to give full faith and credit to that judgment. *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291, 311 (1903). "When a state court refuses credit to the judgment of a sister state . . ., an asserted federal right is denied and the sufficiency of the grounds of denial are for . . . [the Supreme Court of the United States] to decide." *Titus v. Wallick*, 306 U.S. 282, 291.

Under these authorities, Judge Byron's failure to give full faith and credit to the Iowa judgment is a patent violation of CNW's asserted federal right and requires review by this Court. The Full Faith and Credit Clause establishes "the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered." *Morris v. Jones*, 329 U.S. at 552, quoting *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439, 440 (1943). Respondent Judge Byron's action in allowing "reinstatement" reflects a complete disregard for the "salutary principle of common law" recognized in *Morris v. Jones*.

4. Garien's Claim That CNW Must Be Deemed To Have Waived The Statute Of Limitations Does Not Support The Respondent's Failure to Give Full Faith And Credit To The Iowa Judgment.

In granting Garien's motion to "reinstate," respondent Judge Byron relied solely on Garien's claim that Illinois courts have a right and authority to extend, and in Garien's case did extend, the FELA statute of limitations by conditioning prior *forum non conveniens* dismissals on "waiver" of that statute of limitations. App. A, infra, A-1 - A-2.

Petitioner CNW denies that said dismissal was conditioned on such waiver, and the Order of the Madison County Circuit Court dismissing the original Madison County action makes no reference to such a waiver. App. H, A-48.

But, even assuming the original dismissal had been conditioned upon waiver by CNW of the statute of limitations defense, the time for Garien to raise that claim was in the second Iowa action, in response to CNW's motion for summary judgment, or, at the very latest, in an appeal from the judgment entered by the Circuit Court of Clinton County. *Cf. Morris v. Jones*, 329 U.S. at 552. At no time in either Iowa action did Garien ever claim that CNW had waived the defense of statute of limitations, or that the original Illiois dismissal order effected such a waiver. Garien simply allowed the Iowa judgment to become final, and then raised the notion of waiver, for the first time, in his motion for "reinstatement."

The Iowa judgment was res judicata as to Garien's asserted FELA claim, and merged into that judgment were any and all defenses Garien might have asserted in response to CNW's motion for summary judgment based on the statute of limitations. *Cf. Israel v. Farmers Mutual Insurance Association of Iowa*, 339 N.W.2d 143, 146 (Ia. 1983); *Lynch v. Lynch*, 94 N.W.2d 105, 109 (Ia. 1959). Under these principles, Judge Byron may not, consistent with Article IV, Section 1, refuse to give full faith and credit to the Iowa judgment, based on a claim of waiver which Garien was obligated to raise, but never mentioned, in the Iowa courts.

5. Judge Byron's Order "Reinstating" Garien's FELA Claim Seven Years After The Claimed Injury Violates The Provisions of 45 U.S.C. § 56.

45 U.S.C. § 56 requires that an FELA action must be commenced within three years from the day the cause of action accrued. In *Burnett v. New York Central Railway*, 380 U.S. 424 (1965), this Court considered the application of the three-year statute of limitations to an FELA action timely filed in state court, but later dismissed on forum non conveniens grounds. In *Burnett* this Court held that "when a

plaintiff begins a timely FELA action in a state court having jurisdiction . . . and plaintiff's case is dismissed for improper venue, the FELA limitation is tolled during the pendency of the state suit." 380 U.S. at 434-35. However, in such a case, the statute is tolled only "until the state court order dismissing the state action becomes final by the running of time during which an appeal may be taken or the entry of a final judgment on appeal." *Id.*

Garien filed his original FELA action in Madison County, Illinois on September 13, 1984, one day before the running of the three-year statute of limitations under 45 U.S.C. § 56. That action was dismissed under the doctrine of *forum non conveniens* on January 2, 1985. Under Illinois law, an appeal must be filed within 30 days of entry of the order being appealed. Illinois Supreme Court Rule 303, S.H.A. Ch. 110A, par. 303. Therefore, under *Burnett*, Garien had until February 3, 1985, to refile his FELA action in an appropriate forum. However, Garien did not file his FELA action in the Circuit Court of Clinton County until March 22, 1985, 79 days after the original order dismissing his action in Madison County.

Judge Byron's order allowing plaintiff Garien to renew his FELA claim nine years after the action accrued, and over two-and-a-half years after it was originally dismissed, cannot be reconciled with *Burnett*. Under the undisputed chronology of this case, 45 U.S.C. § 56 and this Court's holding in *Burnett* required Judge Byron to deny Garien's motion to "reinstate."

Also unavailing is Garien's contention that the original dismissal was implicitly conditioned, under *Haring v. Chicago and North Western Transportation Company*, 470 N.E.2d 288, 103 Ill.2d 50 (1984), on waiver of the statute of limitations. Even had the original dismissal order of the Madison County Circuit Court been implicitly conditioned upon such a waiver, any such waiver must be consistent with and is limited by *Burnett*. The Illinois courts do not have unlimited discretion to extend indefinitely a statute of limitations mandated by federal statute. "While a state can do what it wants with one of its *own* statutes of limitations, a state cannot have unlimited discretion by virtue of the state law doctrine of *forum non conveniens* to extend the *federal*

limitations period of the FELA and thereby interfere with the uniformity the *Burnett* court was seeking." *Reed v. Norfolk & Western Ry. Co.*, 635 F. Supp. 1166, 1169 (N.D. Ill. 1986) (emphasis in original).

CONCLUSION

The Iowa circuit court properly applied the statute of limitations to Garien's FELA claim. Under the principles of res judicata and full faith and credit, Garien was not and is not entitled to avoid the effects of an adverse judgment which he allowed to become final. The Full Faith and Credit Clause frees CNW of the burden of relitigating a claim already adjudicated in its favor. *See Sutton v. Leib*, 342 U.S. 402, 407 (1952) ("In this way, the Full Faith and Credit clause performs its intended function of avoiding relitigation in other states of adjudicated issues").

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 84 L 840

MARLIN GARIEN,
Plaintiff,

-vs-

CHICAGO and NORTH WESTERN
TRANSPORTATION COMPANY,
a Corporation,
Defendant.

ORDER

On January 19, 1990, Plaintiff's Motion to Reinstate was duly argued before the Court and thereupon taken under advisement in order for the parties to submit memoranda in support of their respective positions.

Upon review of all of the given events, the Court finds that it must take note of the Defendant's assertion of the Affirmative Defense of the Statute of Limitations in respect of the Plaintiff's refiling in Clinton County, Iowa on March 22, 1985. Notwithstanding the subsequent delays and corresponding orders of the Iowa courts, when the Honorable Horace L. Calvo granted Defendant's Motion for Dismissal of this cause on the basis of forum non conveniens, January 2, 1985, on the basis of *Haring v. Chicago and North Western Transportation Company*, 470 N.E.2d 288, 103 Ill.2d 50 (1984), [the provision contained in said cause respecting the subsequent assertion, as in this case, of the Statute of Limitations applied, and the Court therein stating as follows, to-wit:

> "If the case is dismissed, the Order is to be conditioned on the waiver by the defendant of the defense of the statute of limitations should the plaintiff elect to file in an appropriate forum. If

> the defendant refuses to waive the defense of the statute of limitations, or if the defendant asserts that defense in a case filed by the plaintiff in an appropriate forum within one year from the date of dismissal based on the cause of action asserted herein, then the plaintiff should be given leave to reinstate this cause in the Circuit Court of Madison County, Illinois."]

the Order was granted with the expectation that Defendant waived the Statute of Limitations and would, therefore, not assert it.

Accordingly, therefore, the Court does find that this act of defendant thwarted the provisions of this State's policy in allowing dismissal on the question of "interstate forum" on the basis of the *Haring* decision.

WHEREFORE, it is Adjudged, Order and Decreed that Plaintiff's Motion to Reinstate, the Orders of the Iowa courts to the contrary notwithstanding, is hereby allowed, and this cause ordered reinstated for prosecution thereof by the Plaintiff.

Clerk to send copies of this order to all attorneys of record.

DATED this 14th day of MAY, 1990.

/s/ Nicholas G. Byron
Circuit Judge

APPENDIX B

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706
November 20, 1990

Mr. Theodore J. Williams, Jr.
One Metropolitan Square
Suite 2600
St. Louis, MO 63102-2740

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 71025 - People ex rel. Chicago and North Western Transportation Company, petitioner, v. Hon., Nicholas G. Byron, Judge of the Circuit Court of Madison County, et al., respondents.

Motion by petitioner for leave to file a petition for an original writ of prohibition or for a supervisory order. Motion *denied*. Calvo, J., took no part.

JH:lgr
cc: Hon. Nicholas G. Byron
Mr. Patrick S. O'Brien

APPENDIX C

IN THE IOWA DISTRICT COURT FOR CLINTON COUNTY

LAW NO. CL 11882

MARLIN GARIEN,
Plaintiff,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant.

AMENDMENT TO DEFENDANT'S MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendant amends its Motion to Dismiss by adding thereto the following Alternative Motion for Summary Judgment:

MOTION FOR SUMMARY JUDGMENT

Defendant moves the Court to enter judgment for defendant pursuant to Iowa R. Civ. P. 237, as there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law because plaintiff's cause of action is barred by the applicable statute of limitation of three years, as set forth in its Motion to Dismiss. (45 U.S.C. § 56).

Plaintiff has previously instituted an action in Illinois based upon the same cause of action as the present case, which case was dismissed for *forum non conveniens*. Thereafter, plaintiff filed another suit in this Court (Law No. CL9774) based upon the same cause of action, but which was not filed within the requisite period after dismissal of the Illinois case. That case was subsequently dismissed under Rule 215.1. Plaintiff's present case, based on the same cause of action, is barred.

Attached is Defendant's Statement of Material Fact, and filed herewith is defendant's Brief.

/s/ Bennett A. Webster
GAMBLE, RIEPE, WEBSTER,
DAVIS & GREEN
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251
Attorneys for Defendant

Patrick S. O'Brien
Pratt and Callis, P.C.
Route 111 at Airline Drive
P.O. Box 179
East Alton, Illinois 62024

David H. Sivright, Jr.
Shaff & Farwell
408 South Second Street
Clinton, Iowa 52732

IN THE IOWA DISTRICT COURT FOR CLINTON COUNTY

LAW NO. CL 11882

MARLIN GARIEN,
Plaintiff,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant.

STATEMENT OF MATERIAL FACTS

STATE OF IOWA :
:
COUNTY OF POLK: SS.

The undersigned, Bennett A. Webster, attorney for defendant, has reviewed the file in this matter and on oath states that the following Facts appear without dispute in the file:

1. Plaintiff alleges that while working in the employ of defendant on or about September 13, 1981, he suffered purported injuries forming the basis of his cause of action.

2. On September 13, 1984, plaintiff commenced an action by filing a Complaint in the State Circuit Court of Madison County, Illinois arising out of the same injury. The sole cause of action pled by plaintiff in the Complaint was based upon the Federal Employers' Liability Act, 45 U.S.C. §§51-60.

3. On January 2, 1985, the Complaint was dismissed on defendant's motion for lack of venue based upon *forum non conveniens*. Pursuant to Illinois Supreme Court Rule 303, 110A I.R.S. §303, the dismissal order became final on February 1, 1985, thirty (30) days following the entry of the Court's Order of Dismissal.

4. On March 22, 1985, plaintiff filed a Complaint with this Court (Law No. CL9774). In that Complaint plaintiff pled a Federal Employers' Liability Act cause of action against defendant, based

upon the purported same personal injuries the plaintiff allegedly sustained on September 13, 1981. This is also the sole cause of action pled by the plaintiff in his present Petition.

5. A time period of three years elapsed from the date on which plaintiff was purportedly injured until the date on which plaintiff filed the initial Complaint with the State Circuit Court for Madison County, Illinois. An additional forty-eight (48) days passed from the date on which the dismissal of that Complaint became final until the date (March 22, 1985) on which plaintiff filed the previous Complaint with the Court (Law No. CL9774). Said "Complaint" was dismissed under Rule 215.1 on January 2, 1987.

6. Thus, an additional eight (8) months and twelve (12) days have elapsed since the date of the dismissal of plaintiff's first Complaint in this Court.

7. Actions maintained under the Federal Employers' Liability Act must be commenced within three (3) years from the day the cause of action accrues. 45 U.S.C. §56.

8. Because six years and one day have passed, for 45 U.S.C. §56 limitation purposes, from the day on which plaintiff filed his Petition with this Court, plaintiff's cause of action is barred by the running of the applicable statute of limitations.

/s/ Bennett A. Webster

Subscribed and sworn to before me by the said Bennett A. Webster this 13th day of November, 1987.

/s/ Denise J. Procyk
NOTARY PUBLIC IN AND FOR THE
STATE OF IOWA

Patrick S. O'Brien
Pratt and Callis, P.C.
Route 111 at Airline Drive
P.O. Box 179
East Alton, Illinois 62024

David H. Sivright, Jr.
Shaff & Farwell
408 South Second Street
Clinton, Iowa 52732

IN THE IOWA DISTRICT COURT FOR CLINTON COUNTY

LAW NO. 11882

MARLIN GARIEN,
Plaintiff,

vs.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant.

**PLAINTIFF'S RESISTANCE TO
DEFENDANT'S MOTION TO DISMISS**

Comes now the plaintiff, MARLIN GARIEN, by and through his attorneys, PRATT AND CALLIS, P.C. and for his resistance to Defendant's Motion to Dismiss on the Statute of Limitations states as follows:

1. Plaintiff originally filed a Complaint in Madison County, Illinois alleging damages arising from Defendant's negligence under the Federal Employers' Liability Act on September 13, 1984. (See Exhibit A).

2. Defendant filed a Motion to Dismiss on the grounds of Forum Non Conveniens [sic] and had said Complaint dismissed on January 2, 1985.

3. As evidenced above, the Complaint was timely filed within the applicable Statute of Limitations.

4. Further, Plaintiff did not learn that the current petition was dismissed until the spring of 1987 when John McClellan, claim agent for the Defendant, notified Plaintiff's counsel of the notice and strike order of January, 1987. Neither notice was ever received by this office.

WHEREFORE, for the foregoing reasons, plaintiff prays that Defendant's Motion to Dismiss be overruled and that said case be placed on the next available trial docket.

PRATT AND CALLIS, P.C.

BY: /s/ Patrick S. O'Brien
Attorneys for Plaintiff
Route 111 at Airline Drive
Post Office Box 179
East Alton, IL 62024
Telephone: (618) 259-8011

SHAFF & FARWELL

BY: /s/ David H. Sivright, Jr.
Attorneys for Plaintiff
408 South Second Street
Clinton, IA 52732
Telephone: (319) 242-2826

Copy to:

Bennett A. Webster
Gamble, Riepe, Webster, Davis & Green
2600 Ruan Center
Des Moines, Iowa 50309

APPENDIX D

IN THE IOWA DISTRICT COURT FOR CLINTON COUNTY

Case No. CL11882

Marlin Garien,
Plaintiff,

vs.

Chicago and North Western Transportation Company,
Defendant.

Order Granting Defendant's Motion
Motion for Summary Judgment

There comes before the Court without oral argument on the motion calendar pursuant to Iowa Rule of Civil Procedure 117 and District Rule 2.3, Defendant's Motion to Dismiss and Motion for Summary Judgment.

Defendant asks for summary judgment asserting that the action is barred by the three year statute of limitations set out in 45 U.S.C. Section 56. The operative facts are correctly stated in defendant's "Statement of Material Facts" as filed herein on November 17, 1988.

I find that this action is clearly barred by said statute of limitations and that the motion for summary judgment should be and is granted.

IT IS ORDERED BY THE COURT THAT said motion for summary judgment is granted.

IT IS ORDERED BY THE COURT that plaintiff's petition is dismissed and costs are assessed to plaintiff in the amount of $7100.

The Clerk shall give notice of this order pursuant to Rule of Civil Procedure 82.

Signed: June 6, 1988.

/s/ L. D. Carstensen
JUDGE OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IOWA

APPENDIX E

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

84-L-840

MARLIN GARIEN,
Plaintiff,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
a corporation,
Defendant.

MOTION TO REINSTATE

Comes now Plaintiff, MARLIN GARIEN, by and through his attorneys, PRATT AND CALLIS, P.C., and for his Motion to Reinstate states as follows:

1. That on September 13, 1981 Plaintiff was an employee of Chicago and North Western Transportation Company was allegedly injured while in Clinton, Iowa.

2. That on September 13, 1984 suit was instituted in Madison County, Illinois under the Federal Employers' Liability Act.

3. That on November 2, 1984 Defendant by and through its attorneys of record filed a Motion to Dismiss on Forum Non Conveniens.

4. In oral argument and in their Motion to Dismiss represented to the Court that another available forum existed for the Plaintiff in which to pursue his action without risk of losing his cause of action. Whereupon, the Court sustained Defendant's Motion to Dismiss on January 2, 1985.

5. That on March 22, 1985 Plaintiff refiled his action in Clinton County, Iowa. Defendant filed a Motion to Dismiss on the grounds of

Statute of Limitations. Attached hereto is a copy of the Motion which will be referred to as Exhibit A.

6. That on June 6, 1988, Judge L. D. Carstensen sustained Defendant's Motion to Dismiss on the grounds of Statute of Limitations.

7. As Defendant's actions were directly contrary to the representation to this Court, Plaintiff would request that his cause of action filed in Madison County be reinstated as it is the only appropriate forum in which this case can continue.

WHEREFORE, for the following reasons Plaintiff prays that this cause be reinstated and placed upon the next available trial docket.

PRATT AND CALLIS, P.C.

BY: /s/ Patrick S. O'Brien
#03127549
Route 111 at Airline Dr.
P.O. Box 179
E. Alton, IL 62024
(618) 259-8011

ATTORNEYS FOR PLAINTIFF

APPENDIX F

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 84-L-840

MARLIN GARIEN,
Plaintiff,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REINSTATE

COMES NOW defendant Chicago and North Western Transportation company, by and through its attorney, Theodore J. Williams, Jr., and in opposition to Plaintiff's Motion to Reinstate, states as follows:

1. On September 13, 1981, plaintiff Marlin Garien claims to have suffered an alleged injury at Clinton, Iowa when he was struck on the top of his hardhat by a piece of plywood.

2. On September 13, 1984, three years to the day after the alleged incident and the last day on which he could file, plaintiff filed this case in Madison County, Illinois (hereinafter referred to as the "first case") based upon the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60.

3. The Statute of Limitations for cases under the Federal Employers' Liability Act is three years. 45 U.S.C. § 56. Plaintiff's cause of action accrued on the day he was allegedly struck by the plywood, September 13, 1981. *Reading Co. v. Koons*, 271 U.S. 58 (1926); *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 821-23 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1985); *DuBose v. Kansas City S. Ry.*, 719 F.2d 1026, 1028 (5th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984); *Fletcher v. Union Pac. R. R. Co.*, 621 F.2d 902, 906-07 (8th Cir. 1980); *Billings*

v. Chicago, Rock Island and Pac. R. R. Co., 581 F.2d 707, 708-09 (8th Cir. 1978); *Deer v. N. Y. Cent. Ry.*, 202 F.2d 625 (7th Cir. 1958). Therefore, plaintiff filed the "first case" on the last day of the three-year Statute of Limitations, September 13, 1984.

4. On January 2, 1985, the Honorable Horace Calvo dismissed this case under the doctrine of *forum non conveniens* due to the fact that *all* relevant connections were located at or near Clinton, Iowa where plaintiff should certainly have initially filed his lawsuit. A copy of the Courts' Order is attached hereto as Exhibit A and its contents are incorporated by reference herein.

5. The Statute of Limitations was tolled from the time the first case was filed until Judge Calvo's order of January 2, 1985, became final. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 338 n (1978) (Burger, J., concurring); *Burnett v. N. Y. Cent. R. R. Co.*, 380 U.S. 424, 426 (1965); *Billings v. Chicago, Rock Island and Pac. R. R. Co.*, 581 F.2d 707, 709 (8th Cir. 1978); *Reed v. Norfolk and W. Ry. Co.*, 635 F. Supp. 1166, 1169 (N.D. Ill. 1986). The case was dismissed on January 2, 1985; so the Order became final on February 1, 1985, 30 days after dismissal. Illinois Supreme Court Rule 303. There was nothing preventing plaintiff from refiling this case in Clinton, Iowa after January 2, 1985.

6. On March 22, 1985, after allowing approximately 80 days to pass after Judge Calvo's order, plaintiff refiled his case in Clinton County, Iowa (hereinafter referred to as the "second case"), the proper jurisdiction in light of where the alleged accident occurred and where the case should have been initially filed.

7. Plaintiff then allowed his case to sit without any attempt at diligent prosecution for approximately 14 months until June 10, 1986.

8. On June 10, 1986, Judge Havercamp issued an Order stating that cases on file for 18 months as of January 1, 1987, would be dismissed because of failure to prosecute pursuant to I.R.C.P. (Iowa Rules of Civil Procedure) 215.1. A copy of the Order as sent to plaintiff's counsel is attached hereto as Exhibit B and its contents are incorporated by reference herein.

9. The record does not reflect that plaintiff responded to this order nor made any attempt to then prosecute the case.

10. Thereafter, due to plaintiff's ignoring Judge Havercamps's [sic] order of June 10, 1986 or any of the remedies set forth therein; on August 4, 1986, the Clerk of the Court in Clinton County, Iowa, mailed plaintiff's attorney a Strike Notice notifying him of the potential dismissal. A copy of the Strike Notice is attached hereto as Exhibit C and its contents are incorporated by reference herein.

11. Plaintiff again made no attempt to prosecute this case or respond to the order or notice.

12. Subsequently, and again due to plaintiff's failure to respond to the Court's attempts to have him diligently proceed with the case; on January 2, 1987, Judge Pelton dismissed the "second case" because of failure to prosecute pursuant to I.R.C.P. 215.1. A copy of the Courts' Order is attached hereto as Exhibit D and its contents are incorporated by reference herein.

13. Plaintiff made no attempt to seek a rehearing or appeal of this order.

14. More than nine months then passed until September 14, 1987, when plaintiff refiled the case in Clinton County, Iowa (hereinafter referred to as the "third case").

15. Pursuant to appropriate motion, on June 6, 1988, Judge Carstensen granted summary judgment on the "third case" because of the expiration of the Statute of Limitations pursuant to 45 U.S.C. § 56. A copy of the Courts' Order is attached hereto as Exhibit E and its contents are incorporated by reference herein. Said order was a final order 30 days after entry.

16. Plaintiff didn't make any effort to seek a rehearing or appeal this order and thus, it is now final and non-appealable.

17. Thereafter, and fifteen months after Judge Carstensen's dismissal of June 6, 1988; on September 14, 1989, plaintiff filed his Motion to Reinstate this case in Madison County, Illinois.

18. The "second case" was dismissed on January 2, 1987, not because of the expiration of the Statute of Limitations under the Federal Employees Liability Act, but because of plaintiffs' failure to prosecute despite two warnings from the Iowa Court of that possibility. Said warnings was obviously ignored by plaintiff with the consequence that the "second case" was dismissed for failure to prosecute on January 2, 1987.

19. Plaintiff filed the "third case" on September 14, 1987. Summary Judgment was granted on June 6, 1988, due to the expiration of the Statute of Limitations. The Order granting summary judgment is *res judicata* as to any subsequent proceedings in this case. *Fender v. St. Louis Southwestern Ry. Co.*, 392 N.E.2d 82, 85 (Ill. App. 5th Dist. 1979).

20. Plaintiff seems to suggest in the Motion to Reinstate that the "third case" was protected by Illinois Supreme Court Rule 187(c)(2)(ii) requiring defendants to waive Statute of Limitations' defenses when Illinois cases are dismissed because of *forum non conveniens* and refiled in other state courts. Rule 187, however, was not effective when the "first case" was dismissed under the doctrine of *forum non conveniens* on January 2, 1985; said Rule became effective on August 1, 1986, when the "second case" was pending in Iowa. Further, Judge Calvo never made this a provision of his dismissal order.

21. Additionally, even if the rule had been in effect, or Judge Calvo had made the provisions of the rule part of his order of January 2, 1985; it wouldn't apply once plaintiff, through his own lack of diligence failed to prosecute the "second case" in Iowa. That case was not dismissed in Iowa through *any* affirmative action by defendant, but only due to the lack of such action of plaintiff in proceeding with the case in a timely manner.

WHEREFORE, defendant prays that plaintiff's Motion to Reinstate be denied with its costs expended.

ARMSTRONG,TEASDALE,
SCHLAFLY, DAVIS & DICUS

/s/ Theodore J. Williams, Jr. #24498
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed, postage prepaid, to: Patrick S. O'Brien, attorney for plaintiff, Route 111 at Airline Drive, P.O. Box 179, East Alton, Illinois 62024, this 9 day of November, 1989.

/s/ Theodore J. Williams, Jr.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Cause No. 84-L-840

MARLIN GARIEN,
Plaintiff,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Defendant.

DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO REINSTATE

COMES NOW defendant Chicago and North Western Transportation Company, and for its Reply to Plaintiff's Memorandum in Support of his Motion to Reinstate, states as follows:

FACTS

Originally, plaintiff Marlin Garien, a resident of Iowa, filed his FELA case in Madison County, Illinois (hereinafter referred to as the "first case") on the last day before the expiration of the Statute of Limitations. The Madison County Circuit Court dismissed the "first case" on the grounds of forum non conveniens.

Garien refiled his case in Clinton County, Iowa ("second case"). Garien did not file the "second case" before the statute of limitations expired, although he could have so filed.

Under the United States Supreme Court's holding in *Burnett v. New York Central*, 380 U.S. 424, 426 (1965) the State of Limitations under the FELA is tolled while the case is in the wrong jurisdiction. As pointed out by defendant in its Memorandum in Opposition of Plaintiff's Motion to Reinstate, plaintiff filed his complaint on the last day possible before the expiration of the *three* year FELA statute of limitations. Judge Calvo then granted defendant's motion on January 2, 1985.

In this circumstance plaintiff had until February 3, 1985 to refile his case, yet he waited until March 22, 1985. There was *nothing* to prevent plaintiff from refiling the "second case" in Iowa *immediately after* the Court's ruling of January 2, 1985. Yet, as evidenced throughout this record, plaintiff has lacked any measure of diligence in prosecuting this case.

It must also be noted that the Clinton County Circuit Court dismissed the "second case" because of Garien's failure to prosecute during the 21 months his case was on file. This dismissal did not occur because the case was filed after the expiration of the statutory period. Then, some nine months after dismissal of the second case, Garien refiled his case ("third case") again in Clinton County. The "third case" was dismissed with prejudice because of the expiration of the statute of limitations. Garien did not appeal the dismissal, he simply waited 15 more months and filed his Motion to Reinstate with the Madison County Circuit Court.

I.

THIS COURT LACKS JURISDICTION TO REINSTATE THIS MATTER.

This Court is without jurisdiction to reinstate this case, and must give full faith and credit to the Clinton County Circuit Court's judgment, thus respecting dismissal of the "third case" because of the expiration of the statute of limitations.

During the hearing on this motion, this Court questioned whether it had jurisdiction to reinstate the case. Defendant Chicago and North Western Transportation Company, in its Memorandum in Opposition to Plaintiff's Motion to Reinstate, ¶ 19, made reference to the case *Fender v. St. Louis Southwestern Ry. Co.*, 392 N.E.2d 82 (Ill. App. 5th Dist. 1979), to establish that this Court was without jurisdiction to reinstate the case. Garien failed to refute defendant's contention in his Memorandum in Support of Plaintiff's Motion to Reinstate (hereinafter referred to as "Memorandum in Support").

Since the third case was dismissed by the Clinton County Circuit Court with prejudice on the grounds of the expiration of statute of

limitations; this Court is barred by the doctrine of res judicata to reinstate this case. *Fender*, 392 N.E.2d at 84. *See also People v. Kidd*, 75 N.E.2d 851 (Ill. 1947). The doctrine is embodied in the United States Constitution's full faith and credit clause. *Fender*, 392 N.E.2d at 528. The Constitution "requires that each state give full faith and credit to the judgments of the courts of a sister state." *Id. See also Sutton v. Lieb*, 342 U.S. 402 (1952), *reh'g denied* 343 U.S. 921. The Illinois Appeals Court, in *Fender*, explained the doctrine.

> [A] judgment is as conclusive in every other court as it is in the one which rendered it, and no other court can re-hear any claim, issues, or defense which was previously decided or which could have been presented to the court of the sister state.

Fender, 392 N.E.2d at 528.

The Madison County Circuit Court cannot reexamine "matters [that] were actually decided in the prior litigation." *Id.* The Illinois Appeals Court, in *Fender*, which is a case very similar to this case, held:

> "[A] decision of a court of one state holding that an action is barred by a statute of [sic] limitations will preclude the maintenance of a subsequent action in another state on the same claim only if the same statute of limitations applies."

Id. Like *Fender*, in this case the same statute of limitations, 45 U.S.C. 56, applies in both courts. This Court, therefore, is required to respect the Clinton County Circuit Court's judgment. *Id.* at 527. Indeed, this would be true even if the Iowa Court's judgment had been erroneous, which it was not. *See Burnett supra*, and *People ex rel. McAllister v. East*, 100 N.E.2d 746 (Ill. 1951).

In light of the Clinton County Circuit Court's dismissal, the remedy Garien should have pursued was an appeal to the Iowa Appeals Court. *id. See also Kidd*, 75 N.E.2d 851. Instead, he chose to "sleep on his rights" until he then attempted, 15 months later, to reinstate this same case in Madison County, Illinois.

II.

THE CASE WHICH PLAINTIFF ATTEMPTS TO REINSTATE WAS INITIALLY DISMISSED, NOT FOR STATUTE OF LIMITATION, BUT FAILURE TO PROSECUTE.

This Court cannot reinstate this case merely because Garien's Memorandum claims he relied on an "alleged" representation by Chicago and North Western Transportation Company waiving the statute of limitations' defense. Not only is such an assertion without foundation but it is also not relevant nor material. The "second case" was dismissed by the Clinton County Circuit Court because of Garien's failure to prosecute, not because of the expiration of the statute of limitations!

Not only is Garien's argument false and irrelevant, but also the argument is moot. The Clinton County Circuit Court did not dismiss the "second case" because the statute of limitations had expired. Any purported reliance by Garien on the alleged misrepresentation is irrelevant, because Garien's claimed reliance on the alleged representation had no procedural effect. Nothing the defendant did caused the "second case's" dismissal. The "second case" was dismissed, because for almost two years Gairen did nothing. Because of the expiration of the statute of limitations the "third case" was dismissed.

Garien's reference to case law in his Motion in Support is wholly irrelevant to this Court's consideration of Garien's Motion to Reinstate. His reference to the cases of *Satkowiak v. Chesapeake & Ohio Ry. Co.*, 478 N.E.2d 370 (Ill. 1985), *Stein v. Volkswagen of Amer., Inc.*, 481 N.E.2d 1022 (Ill. App. 1st Dist. 1985), and *Haring v. Chicago and N.W. Transp. Co.*, 470 N.E.2d 288 (Ill. 1984), presupposes that the first dismissal in Madison County was conditioned upon defendants' wavier [sic] of the affirmative defense of the Statutes of Limitations, and further presupposes that the "second case," was dismissed because of the expiration of the statute of limitations. As noted above, both suppositions are untrue and wholly unsupported by the evidence. The dismissal of the "first case" was not conditioned on such a waiver and

the "second case" was dismissed because of Garien's failure to prosecute.

Next, Garien makes reference to the cases of *Kavanagh v. Noble*, 332 U.S. 535 (1947), and *Billings v. Chicago, Rock Island and Pac. R. R. Co.*, 581 F.2d 707 (8th Cir. 1978). Garien, using these cases for support, requests this Court to ignore the statute of limitations. The case of *Billings*, however, does not give a court authority to ignore a statute of limitations, the case just reaffirms the court's authority to toll the statute during the pendency of a case. *Billings*, 581 F.2d at 710-711. *See also Burnett*, 380 U.S. at 426. Garien wants this Court to reinstate the "third case" which was dismissed pursuant to the statute of limitations because the "interests of justice require vindication of the plaintiff's rights." Memorandum in Support, p. 4.

Ironically, Garien requests this Court to "vindicate his rights" after he failed to do so himself and "slept on them" for over 8 1/2 years since the date of the accident, Furthermore, Garien allowed the "second case" to sit inactive for 21 months before the case was dismissed, after numerous warnings from the court, for failure to prosecute; then waited nine months to refile the third case, and, rather than appeal the adverse judgment in Iowa, waited 15 more months before attempting to refile the same suit in Madison County.

Garien also cites *Billings* to support the inference that to meet the applicable FELA statute of limitations he would have had to protectively file the "second case" in Clinton County before the Madison County Circuit Court's dismissal became final. This suggestion is also false. Garien could have filed the "second case" after dismissal was final, and before the statutory period expired; indeed, as *Burnett* teaches, federal law clearly allowed 31 days to refile and prosecute his action in the proper court.

CONCLUSION

Defendant emphasizes that the appropriate remedy for Garien to have pursued was an appeal to the Iowa Appellate Court. Garien wholly neglects the inescapable fact that the "second case" was dismissed because of his failure to prosecute.

WHEREFORE, defendant prays that Plaintiff's Motion to Reinstate be denied.

ARMSTRONG, TEASDALE,
SCHLAFLY, DAVIS & DICUS

/s/ Theodore J. Williams, Jr. #24498
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
(314) 621-5070

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed, postage prepaid, to Patrick S. O'Brien, attorney for plaintiff, Route 111 at Airline Drive, P.O. Box 179, East Alton, Illinois 62024, this 15 day of February, 1990.

/s/ Theodore J. Williams, Jr.

APPENDIX G

IN THE
SUPREME COURT OF ILLINOIS

Cause No.

STATE ex rel. CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Plaintiff,

v.

HONORABLE NICHOLAS G. BYRON,
Judge Of The Circuit Court Of Madison County
and MARLIN GARIEN,
Respondents.

**MOTION FOR LEAVE TO FILE
COMPLAINT FOR ORDER OF PROHIBITION, OR
IN THE ALTERNATIVE, FOR SUPERVISORY ORDER**

Comes now movant Chicago and North Western Transportation Company ("CNW"), and for it motion for leave to file complaint for order of prohibition or, in the alternative, for supervisory order, states as follows:

1. This case presents no dispute as to the facts; the issue raised herein are dependent upon the undisputed and indisputable procedural history of this case.

2. The following question of law is presented:

Is a plaintiff entitled to reinstatement of an FELA cause of action in a forum previously determined to be inconvenient, when plaintiff's subsequent action filed in the more convenient forum as dismissed for want of prosecution and a *second* refiled action was then dismissed because of the expiration of the statute of limitations, and plaintiff allowed that adjudication to become final and binding by failing to pursue any appeal?

3. This Court should issue an order of prohibition to respondent the Honorable Nicholas G. Byron prohibiting Judge Byron for proceeding further with the underlying litigation and directing Judge Byron to dismiss the underlying action for the following reasons.

A. On September 13, 1984, Marlin Garien, a resident of Clinton County, Iowa, filed a complaint against CNW in Madison County, Illinois. Garien based his lawsuit on an alleged accident occurring three years previous when a piece of plywood allegedly struck his hard hat while he worked at CNW's Clint, Iowa carshop, on September 13, 1981.

B. On January 2, 1985, the Circuit Court of Madison County granted CNW's motion to dismiss on the ground of forum non conveniens. A copy of the order dismissing the action is filed as Exhibit A to CNW's Complaint. The order made no reference whatsoever to waiver of the statute of limitations, or otherwised conditioned its granting of CNW's motion.

C. On March 22, 1985, Garien filed a lawsuit against CNW in Clinton County, Iowa (the "first Iowa lawsuit"). In its answer filed in that action, CNW included the affirmative defense of the statute of limitations. However, CNW did not file a motion to dismiss based on the statute of limitations and made no effort to have the case dismissed on those grounds.

D. By notice dated May 12, 1986, and notice mailed August 14, 1986, the Circuit Court of Clinton County, Iowa, warned Garien that his Iowa lawsuit would be dismissed on January 1, 1987, unless certain actions were taken to prepare the case for trial. Copies of these warnings are filed as Exhibit B to CNW's Complaint.

E. After the passing of approximately two years, and after Garien's failure to act in accordance with the Court's warnings, on January 2, 1987, the Circuit Court of Clinton County, Iowa, *on its own motion*, dismissed the first Iowa lawsuit for failure to prosecute, *not* on the basis of the statute of limitations. A copy of the Iowa court's order dismissing the action is filed as Exhibit C to CNW's Complaint.

F. After waiting approximately nine moths, on September 14, 1987, Garien refiled his action against CNW in Clinton County ("the second Iowa lawsuit").

G. On October 23, 187, defendant filed its motion to dismiss or for summary judgment in that lawsuit based on the statute of limitations. In opposing that motion for summary judgment, Garien did not contend that the motion should be denied because CNW had allegedly waived the statute of limitations. A copy of Garien's Resistance To Defendant's Motion To Dismiss is filed as Exhibit D to CNW's complaint.

H. On June 6, 1988, the Circuit Court of Clinton County granted CNW's motion for summary judgment in the second Iowa lawsuit. A copy of the order granting the motion is filed as Exhibit E to CNW's Complaint. Garien did not appeal the granting of the motion for summary judgment by the Circuit Court of Clinton County, Iowa, on the grounds that CNW had already waived the statute of limitations, or on any other basis.

I. On September 14, 1989, fifteen months after summary judgment was entered in the second Iowa lawsuit, Garien filed his motion to reinstate this action in Madison County, Illinois. A copy of the motion to reinstate is filed as Exhibit F to CNW's complaint.

J. On May 14, 1990, despite the above history and over defendant's objection, respondent Judge Byron of the Circuit Court of Madison County granted Garien's motion to reinstate. A copy of Judge Byron's order granting reinstatement is filed as Exhibit G to CNW's Complaint. In his order granting the motion to reinstate, Judge Byron relied on the decision in *Haring v. Chicago and North Western Transportation Company*, 470 N.E.2d 288, 103 Ill.2d 530 (1984), in which dismissal on grounds of forum non conveniens *was* conditioned upon agreement not to assert the statute of limitations in certain circumstances.

K. On June 20, 1990, CNW filed its Motion for Certification for Interlocutory Appeal under Supreme Court Rule 308, requesting that Judge Byron certify for immediate appellate review the issue

stated in paragraph 2 above. A copy of the motion for certification is filed as Exhibit H with CNW's Complaint. On September 10, 1990, Judge Byron entered an order denying that motion. A copy of Judge Byron's order denying that motion is filed as Exhibit I to CNW's Complaint.

L. This case is clearly distinguishable from *Haring v. Chicago and North Western*, in that the original order dismissing Garien's complaint based on the doctrine of *forum non conveniens* was *not* conditional. But even assuming that *Haring* established a general waiver requirement for all *forum non conveniens* cases, this case is still outside the scope of *Haring*. *Haring v. Chicago and North Western* sought to insure that a defendant not act unreasonably to deprive a plaintiff of an available alternative forum, after that defendant had obtained dismissal on the basis of *forum non conveniens*. Thus, the court in *Haring* prohibited the defendant therein from asserting the defense "in a case filed by the plaintiff in the appropriate forum *within one year of the date of dismissal*." Here, it is undisputed that CNW did not attempt to have the first Iowa lawsuit dismissed on the basis of the statute of limitations, instead, Garien's first lawsuit filed in Iowa was dismissed on the Iowa Court's own motion, solely because of plaintiff's continuing and protracted failure to prosecute his case, despite repeated warnings from the Iowa court.

M. In the case at bar, CNW did nothing to deprive Garien of an alternative forum, or to thwart the letter or spirit of *Haring v. Chicago and North Western*, when Garien filed his first Iowa lawsuit. True to *Haring*, CNW did not assert the defense in a case "filed within one year" of the dismissal by the Madison County Court in 1985. Instead, CNW only pursued the defense in the *second* Iowa lawsuit after Garien continued to abuse the civil filing process by attempting to again refile, six years after his alleged injury, his dismissed lawsuit.

N. Judge Byron's order granting Garien's motion for reinstatement represents a significant extension of the holding in *Haring v. Chicago and North Western* and a significant extension of the Supreme Court Rule 187, S.H.A. Ch. 110A, par. 187. The order granting reinstatement effectively affords plaintiff a perpetual release from the

statute of limitations, even if the initial refiling is dismissed on other grounds solely attributable to a plaintiff, and a third action if filed over *two* years after the original dismissal.

O. Furthermore, because Garien failed to appeal the dismissal of the second Iowa lawsuit, the doctrine of res judicata bars Garien from obtaining *any* reinstatement of his case. Even if it were meritorious, Garien's claim that CNW had waived the defense of the statute of limitations should have been litigated by Garien in the Iowa courts. Instead, Garien allowed the Iowa adjudication to become final and binding on the parties; as a matter of law, therefore, Garien is barred from relitigating that issue here. *Cf. Pacemaker Food Stores, Inc. v. Seventh Mont Corp*, 97 Ill. Dec. 727, 730, 493 N.W.2d 390 (Ill. App. 2 Dist. 1986); *Woolard v. United States Steel Corp.*, 117 Ill. Dec. 793, 794, 520 N.W.2d 1144 (Ill. App. 5th Dist. 1988). Judge Byron was obligated to give full faith and credit to the decision of the Iowa Court.

P. Judge Byron's order granting reinstatement is inconsistent with the well-established scope and application of the doctrine of *res judicata* and the doctrine of full faith and credit.

4. CNW has no other adequate remedy at law.

5. In the alternative, CNW respectfully requests that this Court, pursuant to Supreme Court Rule 383, should issue a supervisory order directing Judge Byron of the Circuit Court of Madison County to vacate his order granting the motion for reinstatement and to dismiss the underlying action, on the grounds that the action is barred by the final judgment entered in the second Iowa lawsuit.

6. This matter raises significant issues of general importance regarding the scope and application of the doctrine of res judicata and the full faith and credit provisions of the United States Constitution, as well as the dismissal of actions on the grounds of forum non conveniens.

7. In support of this motion, CNW submits the attached Verified Complaint and Suggestions in Support.

WHEREFORE, Chicago and North Western Transportation Company prays that this Honorable Court grant it leave to file the

attached Complaint for Order of Prohibition, Or, In The Alternative, For Supervisory Order.

ARMSTRONG, TEASDALE,
SCHLAFLY, DAVIS & DICUS

/s/ Thomas B. Weaver
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(314) 621-5070

Attorneys for Chicago and North Western Transportation Company

Certificate of Service

A copy of the foregoing was mailed, postage prepaid, to the Honorable Nicholas G. Byron, Judge, Circuit Court of Madison County, Illinois, 155 N. Main Street, Edwardsville, Illinois 62025; and, Patrick S. O'Brien, attorney for plaintiff, Route 111 at Airline Drive, P.O. Box 179, East Alton, Illinois 62024, this 29th day of October, 1990.

/s/ Thomas B. Weaver

IN THE
SUPREME COURT OF ILLINOIS

Cause No.

STATE ex rel. CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Plaintiff,

v.

HONORABLE NICHOLAS G. BYRON,
Judge of The Circuit Court of Madison County
and MARLIN GARIEN,
Respondents.

ORDER

Upon motion by Chicago and North Western Transportation Company for leave to file a Complaint for an Order of Prohibition Or, in the Alternative, for a Supervisory Order, the Court, being duly advised in the premises, orders as follows:

Movant Chicago and North Western Transportation Company is granted leave to file its Complaint for Order of Prohibition, Or, In The Alternative, For Supervisory Order, and the same shall be and hereby is filed. Summons shall issue in accordance with the rules of this Court.

Date:_____ /s/ Unsigned
Judge

IN THE
SUPREME COURT OF ILLINOIS

Cause No.

STATE ex rel. CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,
Plaintiff,

v.

HONORABLE NICHOLAS G. BYRON,
Judge Of The Circuit Court of Madison County
and MARLIN GARIEN,
Respondents.

Original Complaint For Order Of Prohibition Or,
In The Alternative For Supervisory Order

**COMPLAINT FOR AN ORDER OF PROHIBITION,
OR IN THE ALTERNATIVE
FOR A SUPERVISORY ORDER**

Comes now plaintiff herein Chicago & North Western Transportation Company ("CNW") and, in accordance with Supreme Court Rule 381 and 383, moves this Honorable Court to issue an Order of Prohibition, or, in the alternative, a Supervisory Order directing respondent Honorable Nicholas G. Byron, Judge of the Circuit court of Madison County, to vacate his order granting respondent Marlin Garien's ("Garien") motion for reinstatement of his action against defendant, styled *Garien v. Chicago and North Western Transportation Company*, now pending in the Circuit Court of Madison County, Cause No. 84-L-840, and enter an order dismissing said action with prejudice. As grounds for said complaint, CNW states as follows:

1. On September 3, 1984, Garien, an Iowa resident, initially filed an FELA lawsuit in Madison County, Illinois, against CNW, based on an alleged accident occurring when a piece of plywood allegedly fell on his hard hat at CNW's Clinton, Iowa carshop on September 13, 1981.

2. On January 2, 1985, the Circuit Court of Madison County granted CNW's motion to dismiss on the grounds of forum non conveniens. A copy of the order dismissing that action is filed herewith as Exhibit A.

3. On March 22, 1985, Garien filed a lawsuit against CNW in Clinton County, Iowa ("the first Iowa lawsuit").

4. On May 12, 1986, and again on August 14, 1986, the Circuit Court of Clinton County, Iowa, expressly warned plaintiff in writing that the first Iowa lawsuit would be dismissed on January 1, 1987, unless certain actions were taken by the parties. Copies of these warnings are filed herewith as Exhibit B. On January 2, 1987, approximately two years after Garien had filed the first Iowa lawsuit and after Garien's failure to take any action in response to the Court's warnings, the Circuit Court of Clinton County, Iowa *on its own motion*, dismissed the first Iowa lawsuit for the failure of Garien to prosecute the action, *not* on the basis of the statute of limitations. A copy of the order of the Iowa court dismissing the first Iowa lawsuit is filed herewith as Exhibit C.

5. On September 14, 1987, Garien refiled his action against CNW in Clinton County, Iowa ("the second Iowa lawsuit").

6. On October 23, 1987, CNW filed its motion to dismiss or for summary judgment based on the statute of limitations. In opposing the motion for summary judgment, Garien did not claim that CNW had waived the statute of limitations in seeking dismissal of the original action on the grounds of forum non conveniens. A copy of Garien's Resistance To Defendant's Motion To Dismiss in the second Iowa lawsuit is filed herewith as Exhibit D.

7. On June 6, 1988, the Circuit Court of Clinton County granted CNW's motion for summary judgment in the *second* Iowa lawsuit. A copy of the order of the Iowa court dismissing the second Iowa lawsuit is filed herewith as Exhibit E. Garien did not appeal the granting of the motion for summary judgment by the Circuit Court of Clinton County, Iowa.

8. Fifteen months after summary judgment was entered in the second Iowa lawsuit, on September 14, 1989, Garien filed his motion

to reinstate this action in Madison County, Illinois. A copy of the Motion to Reinstate is filed herewith as Exhibit F.

9. On May 14, 1990, over CNW's objection, respondent Judge Nicholas G. Byron granted Garien's motion to reinstate, citing *Haring v. Chicago and North Western Transportation Company*, 470 N.E.2d 288, 103 Ill.2d 530 (1984). A copy of Judge Byron's order granting the motion for reinstatement is filed herewith as Exhibit G.

10. On June 20, CNW filed its Motion for Certification for Interlocutory Appeal, asking that the issue of Garien's claim for reinstatement be certified for immediate appeal, in accordance with Illinois Supreme Court Rule 308. A copy of CNW's motion is filed herewith as Exhibit H.

11. Judge Byron denied that motion by Order dated September 10, 1990. Judge Byron's order denying that motion is filed herewith as Exhibit I.

12. The decision of the Iowa Court dismissing plaintiff's second Iowa lawsuit,from which Garien did not appeal, is a decision on the merits, and is final and binding on Garien under the principles of res judicata, *Cf. Pacemaker Food Stores, Inc. v. Seventh Mont Corp.*, 97 Ill. Dec. 727, 730, 493 N.E.2d 390 (Ill. App. 2 Dist. 1986); *Woolard v. United States Steel Corp.*, 117 Ill. Dec. 793, 794, 520 N.E.2d 1144 (Ill. App. 5th Dist. 1988), and must be given full faith and credit by the courts of Illinois. *Cf. Fender v. St. Louis Southwestern Railway Co.*, 73 Ill. App. 3d 522, 29 Ill. Dec. 525, 528, 392 N.E.2d 82, 85 (Ill. App. 5th Dist. 1979).

13. This case is distinguishable from *Haring v. Chicago and North Western*, in that the original order dismissing Garien's complaint based on the doctrine of *forum non conveniens* was *not* conditional.

14. Even assuming, *arguendo*, that *Haring* established a general condition for any dismissal on *forum non conveniens* grounds, *Haring* nevertheless does not require or support reinstatement of Garien's claim. *Haring* prohibited the defendant therein from asserting the defense "in a case filed by the plaintiff in an appropriate forum *within one year of the date of dismissal*." Here, although CNW included the

affirmative defense of the statute of limitations in its answer in the first Iowa lawsuit, the facts are undisputed that CNW made no effort to obtain dismissal of that lawsuit on those grounds. Instead, Garien's first Iowa lawsuit was dismissed on the Iowa Court's own motion solely because of plaintiff's continuing and longstanding failure to prosecute his case.

15. CNW did nothing to deprive plaintiff of an alternative forum or to thwart the letter or spirit of *Haring v. Chicago and North Western*, when Garien filed his first Iowa lawsuit. Instead, CNW only raised the defense in the *second* Iowa lawsuit after Garien attempted to again refile his dismissed lawsuit, then six years after the alleged injury.

16. CNW respectfully states that Judge Byron's failure to give full faith and credit to the final judgment of the Iowa courts, his failure to apply the doctrine of res judicata, and his granting of plaintiff's motion for reinstatement is in violation of the United States Constitution and is in excess of his jurisdiction.

17. Defendant CNW has no other adequate remedy at law.

WHEREFORE, defendant CNW respectfully prays that this Court issue its order of prohibition, or in the alternative its supervisory order, directing and compelling respondent Judge Byron to vacate his order granting Garien's motion for reinstatement and enter an order dismissing Garien's action with prejudice.

ARMSTRONG, TEASDALE,
SCHLAFLY, DAVIS & DICUS

/s/ Thomas B. Weaver
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(314) 621-5070

Attorneys for Chicago and North
Western Transportation Company

VERIFICATION

Thomas B. Weaver, one of the attorneys for Chicago and North Western Transportation Company, states that he has read the foregoing Motion and Complaint and that they are true in substance and fact.

/s/ Thomas B. Weaver

Subscribed and sworn to before me, a Notary Public, this 26th day of October, 1990.

/s/ Betty L. Biggs
Notary Public

Certificate of Service

A copy of the foregoing was mailed, postage prepaid, to the Honorable Nicholas B. Byron, Judge, Circuit Court of Madison County, Illinois, 155 N. Main Street, Edwardsville, Illinois 62025; and, Patrick S. O'Brien, attorney for plaintiff, Route 111 at Airline Drive, P.O. Box 179, East Alton, Illinois 62024, this 29th day of October, 1990.

/s/ Thomas B. Weaver

IN THE
SUPREME COURT OF ILLINOIS

Cause No.

STATE ex rel. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Plaintiff,

vs.

HONORABLE NICHOLAS G. BYRON,
Judge Of The Circuit Court Of Madison County
and MARLIN GARIEN,

Respondents.

SUGGESTIONS IN SUPPORT OF COMPLAINT FOR ORDER OR PROHIBITION, OR IN THE ALTERNATIVE, FOR A SUPERVISORY ORDER

Chicago and North Western Transportation Company ("CNW") respectfully suggests that respondent Judge Nicholas Byron's order granting respondent Marlin Garien's ("Garien") motion for reinstatement in *Garien v. Chicago & North Western Transportation Company*, Cause No. 84-L-840, is not only directly contrary to the principles of res judicata and full faith and credit, but is also neither justified nor supported by the decision in *Haring v. Chicago and North Western Transportation Company*, 103 Ill.2d 530, 470 N.E.2d 288 (1984), on which Judge Byron relied. The doctrines of res judicata and full faith and credit required the denial of Garien's motion for reinstatement and now require issuance of an order of prohibition or, in the alternative, a supervisory order, directing that Judge Byron vacate his order granting reinstatement and enter an order dismissing Garien's action with prejudice.

I. Procedural History

The underlying action is based on an injury allegedly sustained nine years ago. A summary chronology of its history since 1981 is warranted.

(1) September 13, 1981:	Garien, an Iowa resident, suffers alleged injury when, it is claimed, a piece of plywood falls on his hard hat while he is working at CNW's Clinton, Iowa carshop.
(2) September 13, 1984:	Garien files lawsuit against Chicago and North Western Transportation Company ("CNW") in Madison County, Illinois, based on the alleged injury in 1981.
(3) January 2, 1985:	Pursuant to the motion filed by CNW, the Circuit Court of Madison County dismisses Garien's lawsuit on the basis on forum non conveniens. The order is not conditioned upon and makes no reference to waiver of the defense of statute of limitations.
(4) March 22, 1985:	Garien files a lawsuit against CNW in Clinton County, Iowa, based on the alleged injury in 1981 ("the first Iowa lawsuit").
(5) May 12, 1986:	The Circuit Court of Iowa, pursuant to I.R.C.P. Rule 215.1 advises the parties that the first Iowa lawsuit would be stricken on January 1, 1987, unless certain actions were taken prior to September 15, 1986.
(6) August 14, 1986:	The Circuit Court of Clinton County, Iowa again advises the parties that the first Iowa lawsuit "will be for trial and subject to DISMISSAL on . . . [January 1, 1987] unless an order is entered as provided in . . . [Rule 215.1]" (emphasis in original).

(7) January 2, 1987: After the above warnings to Garien, and Garien's failure to take the required action, the Circuit Court of Clinton County, Iowa, on its own motion, dismisses the first Iowa lawsuit for failure to prosecute.

(8) September 14, 1987: Nine months later, Garien refiles his lawsuit against CNW in the Circuit Court of Clinton County, Iowa (the "second Iowa lawsuit"), over two and one-half years after the dismissal of the Illinois lawsuit under the doctrine of forum non conveniens and over six years after the alleged injury.

(9) October 23, 1987: CNW files a motion to dismiss or for summary judgment based on the statute of limitations. In opposing the motion, Garien never claims that CNW has waived or should be deemed to have waived the defense of the statute of limitations.

(10) June 6, 1988: The Circuit Court of Clinton County, Iowa grants CNW's motion for summary judgment. Garien does not appeal the granting of that motion.

(11) September 14, 1989: Over fifteen months after the Iowa Court grants summary judgment in the second Iowa lawsuit, and long after the Iowa court's ruling becomes final and the time for appeal expires, Garien files his motion to reinstate the action in Madison County, Illinois.

(12) May 14, 1990: Over CNW's objection, respondent Judge Byron grants Garien's motion for reinstatement.

(13) September 10, 1990: Respondent Judge Byron denies defendant CNW's Motion for Certification for Interlocutory Appeal.

Nine years have passed since the date of the alleged injury. Six years have passed since plaintiff Garien first filed a lawsuit against CNW. The above history establishes that the age of the underlying case results not from any dilatory tactics by CNW, but solely because of Garien's failure to pursue his claim.

Despite Garien's unjustified and unexplained delay, despite Garien's failure to prosecute in Iowa, despite Garien's failure to raise in the Iowa litigation the issue of alleged waiver of the statute of limitations, and despite Garien's failure to appeal the summary judgment granted in the second Iowa lawsuit, respondent Judge Byron has ruled that Garien may now pursue this litigation again in Madison County.

In addition to failing to give effect to the judgment of the Iowa courts, Judge Byron, by allowing reinstatement, is rewarding Garien — who is an Iowa resident — for failing to use due diligence in pursuing his first lawsuit in Iowa and failing to appeal the final judgment entered in the second Iowa lawsuit. Furthermore, by allowing reinstatement, Judge Byron is allowing Garien's subsequent neglect and failure to prosecute his lawsuit to void the original dismissal on grounds of forum non conveniens.

As demonstrated below, Judge Byron's order is contrary to Illinois law, is in excess of his jurisdiction, and requires the issuance of an order of prohibition or, alternatively, a supervisory order.

II. The Dismissal With Prejudice Of The Second Iowa Lawsuit Is A Final Judgment On The Merits And Under The Principles Of Res Judicata Bars Respondent Garien, As A Matter Of Law, From Relitigating That Claim In Madison County.

The doctrine of res judicata acts to bar a person from relitigating a claim which has previously been decided on the merits between those

same parties before another court. *Housing Authority for LaSalle County v. Young Men's Christian Association of Ottawa*, 101 Ill.2d 246, 78 Ill. Dec. 125, 127-128, 461 N.E.2d 959, 961 (Ill. 1984). Under Illinois law, dismissal of an action on the basis of the statute of limitations is an adjudication on the merits. *Cf. Chang. v. Northwestern Memorial Hospital*, 549 F.Supp. 90, 95 (N.D. Ill. 1982); *Kraus v. Metropolitan Two Illinois Center*, 146 Ill. App.3rd 210, 100 Ill. Dec. 15, 496 N.E.2d 1080 (1986) (Involuntary dismissal not within any exceptions to Supreme Court Rule 273 would bar filing of subsequent suit on the merits). Under these authorities, Garien's failure to appeal the summary judgment in the second Iowa action caused that ruling to become a final adjudication of Garien's claim on the merits, barring Garien from relitigating the claim against CNW. *Cf. Brown v. Schoenberg*, 121 Ill. App.2d 342, 257 N.E.2d 539 (1970).

In the second Iowa litigation, respondent Garien had the opportunity to raise the issue that, in seeking dismissal on the grounds of forum non conveniens, CNW had allegedly waived the statute of limitations. Respondent Garien, however, never made such a contention. At no stage of the Iowa litigation did respondent Garien ever assert that CNW was barred from raising the statute of limitations. If Garien believed that CNW was required to waive that defense for all future lawsuits, the appropriate time to raise the issue of waiver was in the second Iowa lawsuit.

Likewise, respondent Garien did not appeal the Iowa court's granting of summary judgment, again foregoing the opportunity to claim that CNW should be found to have waived the statute of limitations. Garien was obligated to raise the issue of waiver in the Iowa courts. He cannot be heard to raise the issue first with regard to requested reinstatement in Illinois, after allowing a final judgment in Iowa. The final judgment entered in the second Iowa lawsuit bars respondent Garien from asserting not only any claims or defenses he actually raised, but also any claims or defenses, however meritless, which he could have raised. *Leitch v. Hine*, 66 N.E.2d 90, 393 Ill. 211 (Ill. 1946); *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986).

Where an opportunity has been afforded in a prior case to litigate the question of estoppel to assert the statute of limitations, that issue cannot be litigated in a later action. *Fender v. St. Louis Southwestern Railway Co.*, 73 Ill. App.3d 522, 29 Ill. Dec. 525, 528, 392 N.E.2d 82, 85 (Ill. App. 5th Dist. 1979), citing *House v. Maddox*, 46 Ill. App.3d 68, 4 Ill. Dec. 644, 360 N.E.2d 580 (Ill. App. 1st Dist. 1977). Respondent Garien had such an opportunity in the Iowa lawsuit and he let that opportunity pass. He is therefore barred as a matter of law from seeking reinstatement on those grounds.

The full faith and credit clause of the United States Constitution embodies the common law doctrine of res judicata and requires Illinois courts to recognize and apply the final judgment of courts in other states. U.S. Const., Art. IV, §1; *Fender v. St. Louis Southwestern Railway Co.*, 29 Ill. Dec. at 528, 392 N.E.2d at 85, citing *Brownlee v. Western Chain Co.*, 49 Ill. App.3d 247, 7 Ill. Dec. 635, 364 N.E.2d 926.

> The Constitution requires that each state give full faith and credit to the judgment of the courts of a sister state; a judgment is as conclusive in every other court as it is in the one which rendered it, and no other court can rehear any claim, issues, or defense which was previously decided or which could have been presented to the court of the sister state.

Fender v. St. Louis Southwestern Ry. Co., 29 Ill. Dec. at 528, 392 N.E.2d at 85, citing *Carlson v. Prestige Casualty Co.*, 28 Ill. App.3d 926, 329 N.E.2d 477 (Ill. App. 1st Dist. 1975). *See also Southern Bell Telephone & telegraph Co. v. Woodstock, Inc.*, 34 Ill. App.3d 86, 339 N.E.2d 423 (Ill. App. 1st Dist. 1975).

In *Fender*, plaintiffs filed an FELA action in Illinois and the action was dismissed on the grounds of forum non conveniens. Plaintiffs then commenced an action in Texas. The Texas court granted defendant's motion for summary judgment on statute of limitation grounds. Plaintiffs then refiled the action in Illinois, claiming that defendant was estopped from raising the statute of limitations in the Texas action. In affirming the dismissal of Fender's second Illinois action, the 5th District of the Illinois Court of Appeals expressly held that the full faith

and credit provisions of the United States Constitution, and the doctrine of res judicata, as a matter of law barred Fender from relitigating the FELA claim, including the issue of the statute of limitations.

CNW respectfully asserts that Judge Byron's order granting reinstatement is inconsistent with the law of Illinois regarding res judicata, as reflect in the decisions cited above, and with the full faith and credit provision of the United States Constitution. In granting the motion for reinstatement, Judge Byron has acted in excess of his jurisdiction. Intervention by the Court through an order of prohibition or a supervisory order is required to prohibit Judge Byron from proceeding further with the underlying lawsuit.

II. The Order Granting Reinstatement Is Not Supported By The Holding In *Haring v. Chicago and North Western Transportation Company.*

In granting respondent Garien's motion for reinstatement, Respondent Judge Byron relied on the holding of this Court in *Haring v. Chicago and North Western Transportation Company*, 470 N.E.2d 288, 103 Ill.2d 530 (1984). The holding in *Haring* does not support, much less require, the reinstatement of Garien's claims against CNW.

Unlike *Haring*, the order granting the dismissal of Garien's claims on the grounds of forum non conveniens did *not* contain language prohibiting CNW from asserting the statute of limitations defense in a case thereafter filed by the plaintiff in an appropriate forum. Therefore, *Haring* is not controlling.

Even assuming that *Haring* requires that all dismissals be conditioned upon waiver of the statute of limitations if plaintiffs elects to refile, CNW did not violate the letter or spirit of *Haring*. CNW made no attempt to dismiss the first Iowa lawsuit on statute of limitations grounds. Rather, the Iowa Court dismissed the first action, sua sponte, because of Garien's failure to prosecute. That CNW included the statute of limitations defense in its answer is wholly irrelevant. If merely including that defense in CNW's answer was inconsistent with *Haring* and in violation of the terms of this dismissal (which it clearly

was not), then respondent Garien should have moved to strike the affirmative defense at that time. He did not.

Only in the second Iowa lawsuit, filed over two and one-half years after the dismissal of the Illinois lawsuit for forum non conveniens, did CNW seek to dismiss based upon the statute of limitations. Neither *Haring* nor Supreme Court Rule 187, S.H.A. ch. 110A, ¶ 187, require that a defendant seeking dismissal on forum non conveniens grounds *forever* waive the statute of limitations defense. In fact, the language of *Haring* is to the contrary, reciting only that the defendant therein could not rely on that defense in an action "filed within one year of the date of dismissal."

Had respondent Garien waited over two years before filing an action in Iowa, CNW would have been entitled to raise the statute of limitations, even under *Haring*. Likewise, the dismissal of Garien's first Iowa lawsuit for failure to prosecute did not deprive CNW of that defense. Respondent Garien was never granted absolute discretion to delay pursuit of his claim until it suited him to pursue it. Nothing in *Haring* supports Garien's claim that dismissal of an action on forum non conveniens grounds gives a plaintiff the perpetual right to reassert a claim, however stale he allows it to become. Yet, that is the effect of Judge Byron's ruling.

Even if the current underlying claim were not barred by res judicata, reinstatement would have been barred by the statute of limitations. Neither *Haring* nor any other precedent requires or supports a contrary holding. Neither does logic of fairness.

III. An Extraordinary Order Of Prohibition Is Necessary To Prevent Respondent From Acting In Excess Of His Jurisdiction.

An order in prohibition is appropriate to prevent a court from "assuming jurisdiction not vested in it, or exceeding jurisdiction which it has been going beyond its powers in a matter within its jurisdiction." *People ex rel. Modern Woodmen of America v. Circuit Court of Washington County*, 347 Ill. 34, 179 N.E. 441, 444 (Ill. 1931). *See also*

People ex rel. No. 3 J&E Discount, Inc. v. Whitler, 81 Ill.2d 473, 410 N.E.2d 854, 43 Ill. Dec. 721 (Ill. 1980).

Respondent Garien's claim is barred by the doctrine of res judicata and the full faith and credit provisions of Article IV, Section I of the United States Constitution. In granting Garien's motion for reinstatement, respondent Judge Byron has failed to apply these fundamental, well-established doctrines and has exceeded his jurisdiction. *See, e.g., People ex rel. Modern Woodmen of America v. The Circuit Court of Washington County*, 347 Ill. 34, 179 N.E. 441 (1931) (order of prohibition appropriate to prevent retrial of claim barred by doctrine of res judicata).

Here, post-trial appeal would not provide CNW with an adequate remedy. In opposing the motion for reinstatement, CNW raised the issues of res judicata, full faith and credit, and the inapplicability of *Haring*. Judge Byron nevertheless granted the motion. Having already been forced to respond to Garien's complaints once in Illinois and twice in Iowa courts, CNW should not be compelled to incur the expense and harassment of defending this action again, over nine years after the alleged injury, when it is clearly barred as a matter of law. *Cf. People ex rel. Modern Woodmen of America v. Circuit Court of Washington County*, 347 Ill. 34, 179 N.E.441 (1931).

An extraordinary order of prohibition is warranted prohibiting Judge Myron from proceeding further with this action, and directing Judge Byron to vacate his order granting the motion for reinstatement and to enter an order dismissing Garien's action with prejudice.

IV. In The Alternative, The Court Should Issue Its Supervisory Order Advising Respondent Byron To Dismiss The Underlying Action With Prejudice.

In the alternative, should the Court decline to issue an order of prohibition, it should issue a supervisory order under Supreme Court Rule 383, compelling the vacation of Judge Byron's order granting reinstatement and ordering the denial of Garien's motion for reinstatement and dismissal, with prejudice, of Garien's action against CNW. S. H.A., Ch. 110A, ¶ 383.

CONCLUSION

Based on the foregoing, plaintiff herein CNW respectfully requests that this Court issue an order of prohibition or, in the alternative, a supervisory order, compelling respondent the Honorable Nicholas Byron to vacate his order granting reinstatement and directing Judge Byron to enter an order dismissing with prejudice Garien's action against Chicago and North Western Transportation Company.

ARMSTRONG, TEASDALE,
SCHLAFLY, DAVIS & DICUS

/s/Thomas B. Weaver
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Attorneys for Plaintiff

Certificate of Service

A copy of the foregoing was mailed, postage prepaid, to the Honorable Nicholas G. Byron, Judge, Circuit Court of Madison County, Illinois, 155 N. Main Street, Edwardsville, Illinois 62025; and Patrick S. O'Brien, attorney for respondent Garien, Route 111 at Airline Drive, P.O. Box 179, East Alton, Illinois 62024, this 29th day of October, 1990.

/s/ Thomas B. Weaver

IN THE
SUPREME COURT OF ILLINOIS

Cause No.

STATE ex rel. CHICAGO AND NORTH
WESTERN TRANSPORTATION COMPANY,
Plaintiff,

v.

HONORABLE NICHOLAS G. BYRON,
Judge of the Circuit Court of Madison County
and MARLIN GARIEN,
Respondents.

AFFIDAVIT REGARDING SUPPORTING RECORD

Thomas B. Weaver, being duly sworn upon his oath, does hereby state and aver that he is one of the attorneys for Chicago and North Western Transportation Company, and that the attached records are true and accurate copies of records, proceedings and other documents filed in the trial court in *Garien v. Chicago and North Western Transportation Company*, Circuit Court of Madison County, Cause No. 84-L-840, and *Garien v. Chicago and North Western Transportation Company*, Circuit Court of Clinton County, Iowa, Cause Nos. Cl9774 and CL11882.

/s/ Thomas B. Weaver

Subscribed and sworn to before me, a Notary Public, this 26th day of October, 1990.

/s/ Betty L. Biggs
Notary Public

My Commission Expires:
Mar. 19, 1993

APPENDIX H

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 84-L-840

MARLIN GARIEN,
Plaintiff,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION CO.,
Defendant.

ORDER

This matter coming on for hearing on the motion of defendant to dismiss and the Court having reviewed the pleadings, motion and memorandum of law and affidavit filed herein, and thereby being fully advised in the premises,

THEREFORE, it is hereby ordered that said motion to dismiss under the doctrine of forum non conveniens is granted.

/s/ Horace L. Calvo
Judge

Date: Jan. 2, 1985